(5)

No. 92-1402

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a local law requiring disposal of all trash, regardless of origin, at a designated local facility, and prohibiting the export of such trash out of state, constitutes a burden on and a discrimination against interstate commerce in violation of the Commerce Clause of the United States Constitution.

LIST OF PARTIES

Petitioners

C & A Carbone, Inc.

Recycling Products of Rockland, Inc.

C & C Realty, Inc.

Angelo Carbone

Respondent in Interest

Town of Clarkstown, New York

Other Respondents

"John Doe 1 through 6"

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the Supreme Court, Appellate Division, Second Department of the State of New York was rendered on August 31, 1992. That decision is reported at 182 A.D.2d 213 and 587 N.Y.S.2d 681 and is reproduced at pages 1a-15a of the appendix to the petition for certiorari ("Pet. App."). The decision of the Court of Appeals of the State of New York denying petitioners' motion for leave to appeal, rendered on October 27, 1992, is reported at 80 N.Y.2d 260 and 605 N.E.2d 874 and is reproduced at Pet. App. 47a.

The July 15, 1991 decision of the court of original jurisdiction, the Supreme Court of the State of New York, County of Rockland, is unreported and is reproduced at Pet. App. 22a-33a. The September 16, 1991 opinion of that court upon reargument is unreported and is reproduced at Pet. App. 16a-21a.

The July 11, 1991 decision of the United States District Court for the Southern District of New York in a related action between the parties is reported at 770 F. Supp. 848 and is reproduced at Pet. App. 34a-46a.[1]

JURISDICTION

The decision of the Supreme Court, Appellate Division, Second Department of the State of New York was issued on August 31, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause of the United States Constitution, art. I, sec. 8, cl. 3, which provides in pertinent part: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ."

This case also involves Local Laws, 1990, No. 9 of the Town of Clarkstown, New York ("Local Law 9"), which is reproduced at Pet. App. 48a-54a. Most pertinent, Sections 3(C)-(D) and 5(A) provide that:

> Section 3. Collection and Disposal of Acceptable Waste
>
> * * * *

[1] All parties to the proceeding below are identified in the list of parties, *supra*. "John Doe 1 through 6" were named defendants below, but to the best of petitioners' knowledge, do not refer to any real persons or entities. There are no parent companies or non-wholly-owned subsidiaries to be listed pursuant to Rule 29.1 of this Court.

> C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code . . . . As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.
>
> D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than its facilities or sites set forth in Paragraph "C" above.
>
> * * * *
>
> Section 5. Acceptable and Unacceptable Waste Generated Outside the Town of Clarkstown
>
> A. It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables . . . brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code.

Pet. App. 51a-53a; R. 67-69.

STATEMENT OF THE CASE

On August 7, 1989, the New York State Department of Environmental Conservation ordered the Town of Clarkstown, New York to close a landfill that it had operated since the 1950's, citing repeated environmental violations. Pet. App. 3a; R. 202. The order further required the town to establish a transfer station to replace the

landfill as a means of handling the town's trash. Pet. App. 35a; R. 219. A transfer station is a facility that receives unsorted trash, bales it, and sends it onward to disposal sites such as landfills.

Faced with the problem of financing the construction and operation of the transfer station, Clarkstown entered into an arrangement with a private contractor, Clarkstown Recycling, Inc. Under this agreement, the contractor would construct the transfer station and operate it for five years. Pet. App. 4a, 35a; Affidavit of Charles E. Holbrook, Supervisor of the Town of Clarkstown, J.A. 10, R. 59. During this five year period, the town guaranteed the contractor a minimum of 120,000 tons of trash to process each year at a price of $81.00 per ton. *Id.* If this guaranteed quantity was not forthcoming, the town agreed to pay the contractor the difference in lost revenue. *Id.* In return for this guarantee, the town was given the right to acquire the facility at the end of five years for a price of one dollar. *Id.*

If the town had simply entered into the agreement, this litigation would never have occurred. However, in an effort to protect its contractor from competition, and thereby minimize the possibility that the town would have to pay under its guarantee, the town also enacted a local ordinance—Local Law 9. That ordinance requires that *all* acceptable, non-recyclable waste finding its way into Clarkstown—whether originating in the town, in other points in New York, or out of state—must be disposed of at the town's designated transfer station.[2] Pet. App. 24a-25a; Local Law 9, §§ 3(C) and 5(A), Pet. App. 51a, 53a. Thus, Local Law 9 effectively prohibits the export

[2] "Acceptable" waste under Local Law 9 includes residential, commercial, and industrial solid waste, but does not include hazardous waste (i.e., waste designated as hazardous under various federal statutes), pathological waste (i.e., various types of medical waste and other types of infectious or biohazardous waste), and sludge (i.e., waste from a sewage treatment plant, wastewater treatment plant, water supply treatment plant, or air pollution control facility). Local Law 9 § 1, Pet. App. 48a-49a.

of trash to points outside the town unless first processed by the designated facility.

Ordinances of this type, requiring that certain types of waste in a locality must be brought to a designated facility and cannot be exported, are known as "flow control" ordinances. *See* Angela Logomasini, *Municipal Solid Waste Mismanagement: Government Failure and Private Alternatives*, 3 J. Regulation and Social Costs 61, 63-64 (1993); Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste At Home*, 76 Minn. L. Rev. 1219, 1230-31 (1992) (student note). They have proliferated in recent years as a convenient means of financing local waste disposal projects and facilities by assuring a local facility that it will have a steady supply of waste to process and will therefore be able to operate cost-effectively. Clarkstown's ordinance falls squarely within this category. Indeed, the town has admitted throughout this action that Local Law 9 was enacted for the economic purpose of avoiding payments under the minimum tonnage guarantee to its contractor. *See* Charles Holbrook Aff., J.A. 9-11, R. 58-61; *see also* Pet. App. 43a.

This case began as a state court action by the town against petitioners to enforce Local Law 9. Until issuance of the decision below, petitioners operated a recycling center in Clarkstown.[3] This recycling center re-

[3] Petitioners' facility is an authorized recycling center. Pet. App. 6a.

The town sought in the courts below to characterize petitioners' facility as a "transfer station." Pet. App. 26a. Because petitioners' bypassing of the town-designated facility is prohibited by Local Law 9 whether their operation is characterized as a recycling center or a transfer station, the choice of labels is not directly material to this action. The town may have been attempting to establish a record that would enable it to close petitioners' facility pursuant to a local zoning ordinance, not challenged here, under which all transfer stations other than the town-designated transfer station are prohibited. In any event, the town's characterization was never adopted by the courts below.

ceived trash from customers in New Jersey and New York State, which was processed at the price of $70.00 per ton. At the recycling center, trash was separated into recyclable and non-recyclable parts. The recyclable parts were sent to out-of-state recycling processors. The non-recyclable trash was hauled out of state to landfills or to facilities that burn the waste to generate power. Pet. App. 35a. Petitioners shipped 150 tons of trash per week to sites in Ohio, Delaware, Pennsylvania, Kentucky, Indiana, and Florida. Pet. App. 26a.

While Local Law 9 permits approved recycling centers, such as petitioners' operation, to send recyclable materials out of town for processing, it prohibits the shipment of the non-recyclable portion of the trash to points out of town or out of state; it requires such trash to be sent instead to the town's designated trash disposal facility.[4] Thus, as applied to petitioners, the ordinance bans the movement of the nonrecyclable trash from the recycling center directly to out-of-state destinations.

As a result, the ordinance has had the effect of putting petitioners out of business despite their significant cost advantage over the town's designated transfer station. The matter was brought to a head in March 1991 by a highway accident involving an Ohio-registered tractor-trailer that was hauling approximately 23 tons of baled trash from the petitioners' facility to an Indiana landfill. Pet. App. 6a. Upon investigation of the accident, local Clarkstown police determined that this trash, which had originated at points both within and without New York state, was bypassing the town's designated transfer station. Thereafter, the police placed petitioners' operation under surveillance; the police stopped on the highway a number of tractor-trailers entering and leaving petitioners' facility to search for non-recyclable trash that likewise was bypassing the town's transfer station. Finding such waste,

[4] Local Law 9 §§ 3(C) and 5(A), Pet. App. 51a, 53a.

the police seized the drivers' loads, notwithstanding the fact that at least some of the trash had originated out-of-state and all of it was headed out-of-state to locations in Illinois, Indiana, West Virginia and Florida.[5] Pet. App. 6a, 26a.

Armed with this evidence of non-compliance, the town sued petitioners in the Supreme Court of Rockland County on March 18, 1991, to enjoin them from disposing of their nonrecyclable trash at any site other than the designated facility. Pet. App. 6a-7a, 36a. In the First Amended Answer to the First Amended Complaint, petitioners asserted a defense based on the invalidity of Local Law 9 under the Commerce Clause. Pet. App. 55a, R. 407.[6]

On March 27, 1991, while the state court action was pending, petitioners brought an action in the United States District Court for the Southern District of New York, challenging the local ordinances as, *inter alia*, violative of the Commerce Clause. *C & A Carbone, Inc. v. Town of Clarkstown and Clarkstown Recycling Ctr.*, No. 91 Civ. 2105 (CLB) (S.D.N.Y.). On July 11, 1991, the federal

[5] These highway stops and searches were graphically described in the affidavit of Gil Font, an ICC-licensed motor carrier from Hartford, Alabama:

> On or about March 11, 1991, three (3) trucks were stopped on the New York State Thruway by what the drivers described as a "SWAT Team." These drivers were forced from their cabs and lined up along side their trucks while police officers searched the trucks for solid waste. There were no violations of any traffic laws nor were my drivers presented with any warrants for the detention or search of their trucks. The police then confiscated these loads, without warrants or other legal process and directed my drivers to refrain from doing any business at the Carbone facility stating that every truck and its contents would be seized and impounded. . . .

R. 84.

[6] Petitioners also asserted defenses at that time under the Due Process Clause and state law.

court (Brieant, C.J.) granted a preliminary injunction against the enforcement of Local Law 9. Pet. App. 45a. That court held it "likely" that petitioners could demonstrate the law to be an impermissible burden on interstate commerce:

> Although ostensibly Local Law No. 9 was promulgated to protect the health and environment of the residents of Clarkstown from the hazards associated with dumping solid wastes in landfills, the Town cannot legislatively slow down or prohibit the flow of commerce, in this case, interstate solid waste products, by artificially inflating the price of processing solid waste generated without the Town from $70/ton to $81/ton and thereby augment the economic security of the Town.
>
> It does not seem likely that the Town's interest in meeting its tonnage requirements to defendant Clarkstown Recycling Center, Inc., and in so doing avoid a penalty for each ton under the requisite annual minimum of 120,000 tons . . . can constitutionally justify the requirement that solid waste processors and carters expend the sum of $81/ton, rather than the $70/ton they paid prior to the enactment of Local Law No. 9, to process and cart the same without of Town solid waste to the same without of Town facilities. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) . . . .

Pet. App. 43a.

Despite the preliminary injunction issued by the federal court, proceedings continued in the Supreme Court of Rockland County. The town filed a motion for preliminary injunction. By stipulation, this motion was treated as a motion for summary judgment. Pet. App. 22a. Both parties filed affidavits in support of their positions. *Id.* On July 15, 1991, the state court issued a decision holding Local Law 9 to be constitutional, granting summary judgment to the town, and issuing an injunction against petitioners. Pet. App. 32a. The state court held that

Local Law 9 did not violate the Commerce Clause because it treated trash originating out-of-state the same as trash originating in-state. Pet. App. 29a-31a. Wholly ignoring the export restriction, the court concluded that "defendants have failed to demonstrate that Local Law #9 has any 'demonstrable effect whatsoever on the interstate flow of goods.'" *Id.* at 30a.[7] As a result of this state court decision on the merits, the federal court dissolved its preliminary injunction.

On reargument, the state trial court again upheld the validity of the ordinance against Commerce Clause challenge, this time applying the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Despite uncontroverted evidence that the law was being enforced with respect to shipments of trash that included trash originating out of state and destined to points in other states, Pet. App. 26a, the court concluded that petitioners had not provided sufficient information concerning "the nature of their alleged interstate commerce activities" to upset the ordinance. Pet. App. 18a-19a. In so doing, the state court again made no mention of the fact that petitioners shipped *all* of their trash *to* out-of-state facilities after separation.

On appeal, the New York Supreme Court, Appellate Division, Second Department, affirmed the trial court's decision. Pet. App. 14a. Like the trial court, the Appellate Division did not address the impact of the ordinance on the export of trash. Rather, focusing solely on the origin of the trash subject to the ordinance, the Appellate Division held Local Law 9 valid under the Commerce Clause because it "applies evenhandedly to all solid waste procesed within the Town, regardless of point of origin," Pet. App. 11a. It also concluded that the $11 per ton differential in processing charges, if it had "any effect on the interstate flow of solid waste," was permissible in light

[7] The court also rejected petitioners' due process and state law claims.

of "the legitimate and significant public concerns underlying the local law. . . ." Pet. App. 12a. The Appellate Division took note of the contrary views expressed by the federal court, but stated that the federal decision "does not require that we rule in [petitioners'] favor here." *Id.* Thereafter, the New York Court of Appeals denied petitioners' motion for leave to appeal, Pet. App. 47a, and proceedings were instituted in this Court. This Court granted certiorari on May 24, 1993.

SUMMARY OF ARGUMENT

The efforts of states and localities to interfere with the free interstate movement of trash have now come full circle. Where trash was once an article of commerce that localities did not want, and where capacity for its disposal was once hoarded, the opposite is now frequently true. As local jurisdictions such as Clarkstown sponsor the construction and operation of new waste disposal facilities, they find that the new facilities need to process substantial quantities of trash to operate economically. Flow control laws, which are local restrictions on the export of trash, are attempts to hoard the trash located within the boundaries of a locality and thereby capture the fees for disposing of it. Because flow control laws are intended to reserve a valuable resource for local use, they have the same fundamental purpose as the restrictions on the import of trash struck down by this Court in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992); and *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992).

This Court's decisions have long established that the Commerce Clause forbids a state or a subdivision of a state from restricting the export of privately-owned articles of commerce. Nor can a state or one of its subdivisions require that an article of commerce be processed

locally before it enters the stream of commerce. Local Law 9, however, does exactly that. On its face, and as applied in this action against petitioners, Local Law 9 forbids individuals or companies located in Clarkstown from disposing of non-recyclable waste by sending it directly to out-of-town or out-of-state facilities that are willing to receive the waste for a fee. Moreover, this restriction applies both to locally-generated trash and to trash originating outside Clarkstown.

A law that "overtly blocks the flow of interstate commerce at a [locality's] borders" is subject to a "virtually *per se* rule of invalidity." *City of Philadelphia*, 437 U.S. at 624. Given its direct restriction on exports, the Clarkstown ordinance violates the Commerce Clause regardless of its motivation, since the "evil of protectionism can reside in legislative means as well as legislative ends." *Id.* at 626. But in any event, the clear purpose of the ordinance, on its face and as confirmed by the town supervisor, *is* economic protectionism—to assure the town-designated facility a supply of revenue-generating trash, thereby reducing the possibility that the town will have to pay that facility for a minimum quantity of trash pursuant to a "take or pay" guarantee. The town is pursuing this goal at the direct expense of out-of-town residents who would otherwise send their trash to petitioners' facility, which would in turn send the non-recyclable portion to out-of-state facilities for final disposal at lower cost.

In any event, even if the economic goals of the ordinance could somehow be deemed non-protectionist, they could be met through non-discriminatory means. If the town's designated facility cannot sustain itself by charging competitive rates, the town could offset the deficit by, for example, increasing local taxes or imposing utility surcharges. Other localities are using alternative, non-discriminatory approaches such as these to support new waste facilities.

Although Local Law 9 should properly be struck down under the Court's test of "virtual *per se* invalidity," the same result follows if the ordinance is instead analyzed under the balancing standard applicable to non-discriminatory laws that have a merely incidental effect on interstate commerce. When the local benefits of avoiding the need to compete for trash or to raise taxes or utility fees to fulfill a take-or-pay guarantee are weighed against the burden that an export restriction imposes on interstate commerce in the form of increased costs of trash disposal, elimination of competition through price or technological improvements, and disincentives to entry into the waste disposal business, it is clear that the burden on interstate commerce is excessive in relation to the local benefits. Thus, under either the balancing or *per se* approaches, the ordinance violates the Commerce Clause.

ARGUMENT

I. FLOW CONTROL LAWS ARE A CONTINUATION OF LONG-STANDING EFFORTS BY LOCAL JURISDICTIONS TO ISOLATE THEIR TRASH PROBLEMS FROM THE NATIONAL ECONOMY

Trash disposal has been a simmering national problem for at least a quarter of a century. As the United States became increasingly urbanized and as more disposable goods and containers found their way into the marketplace, localities had to find ways to deal with the mounting quantities of trash that were produced. At the same time, environmental concerns related to trash disposal assumed a higher profile in the national consciousness. *See* Jo-Walter Spears, *Solid Waste Management: A Short History, in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing* 177 (1988); Mesnikoff, *supra*, at 1219-21.

The first reaction of local jurisdictions wrestling with trash problems was to attempt to hoard their own waste

disposal facilities by keeping foreign trash out. Thus state laws and local ordinances banning trash originating outside the town, or establishing higher fees for out-of-town than for local trash, proliferated. This Court had occasion to address this problem first in *City of Philadelphia*, where it held that waste is a legitimate article of commerce within the protection of the Commerce Clause, and struck down a state's efforts to ban the importation of waste to preserve limited landfill space. Then, this Court struck down under the Commerce Clause more sophisticated efforts to restrain the importing of waste in *Fort Gratiot* and *Chemical Waste Management*.

Within the past few years, however, a new wrinkle on the trash disposal problem has developed. In response both to new environmental requirements and to the declining capacity of existing landfills, some localities have had to close the landfills in which they previously disposed of trash at low cost. Of those localities, some have responded to the situation by relying on the existing nationwide market for trash disposal, sending household and industrial waste by truck or rail to facilities out of town or out of state.

Other localities have chosen to establish local waste disposal facilities, typically under contract with a private operator. Some of these new facilities take the form of landfills, which are now significantly more expensive to open and operate as a result of more advanced environmental safeguards. Some are waste-to-energy plants or other waste treatment facilities of various kinds. Still others, like the Clarkstown facility involved in this case, are simply transfer stations—*i.e.*, operations that process and bale the trash for shipment to facilities elsewhere for final disposal. *See* Pet. App. 3a.

The new trash facilities generally share one characteristic: they cost substantial amounts of money. These costs must, of course, be recovered over time either

through fees charged by the facility for its services or through public subsidies. The higher the volume of trash sent to a facility, the greater the ability of the facility to recover its own costs, and the less burdensome the facility is for the locality that has sponsored its construction and operation.

Hence, trash is no longer an unwanted commodity; it has instead become a valuable resource. In effect, trash is now the raw material needed by the new waste facilities. Localities have responded accordingly. Instead of seeking to hoard their landfills for their own citizens, as they had previously done, they now seek to hoard their trash. Some, such as Clarkstown, go even further and seek to appropriate all trash that finds its way within their borders.

The result has been the proliferation of so-called "flow control laws." There appear to be no reliable statistics as to the number of counties, municipalities, or other local government units that have actually adopted flow control ordinances. However, at least 27 states have enacted statutes that authorize local governments within the state to adopt such laws.[8] Most of these statutes provide

[8] Colorado (Colo. Rev. Stat. § 30-20-107); Connecticut (Conn. Gen. Stat. § 22A-220A); Delaware (Del. Code Ann. tit. 7, § 6406 (31)); Florida (Fla. Stat. ch. 403.713); Hawaii (Haw. Rev. Stat. § 340A-3(a)); Illinois (Ill. Rev. Stat. ch. 34, para. 5-1047); Indiana (Ind. Code § 36-9-31-3 & -4); Iowa (Iowa Code § 28G.4); Louisiana (La. Rev. Stat. § 30:2307(9)); Maine (Me. Rev. Stat. Ann. tit. 38, § 1304-B(2)); Minnesota (Minn. Stat. § 115A.80); Mississippi (Miss. Code Ann. § 17-17-319); Missouri (Mo. Rev. Stat. § 260.202); New Jersey (N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5); New York (1991 N.Y. Laws ch. 569, at 1687-89); North Carolina (N.C. Gen. Stat. 130A-294); North Dakota (N.D. Cent. Code, § 23-29-06(6) & (8)); Ohio (Ohio Rev. Code Ann. § 343.01(H)(2)); Oregon (Or. Rev. Stat. § 268.317(3) & (4)); Pennsylvania (Pa. Stat. Ann. tit. 53, § 4000.303(e)); Rhode Island (R.I. Gen. Laws § 23-19-10(40)); Tennessee (Tenn. Code Ann. 68-211-814); Vermont (Vt. Stat. Ann. tit. 24, § 2203a, 2203b); Virginia (Va. Code Ann. § 15.1-28.01); Washington (Wash. Rev. Code §§ 35.21.120, 36.58.040); West Virginia (W. Va. Code 240-2-1h); Wisconsin (Wis. Stat. § 159.13(3), (11)).

that a local authority may designate one or more facilities to receive all trash in the local jurisdiction. The result has been the Balkanization of waste facilities, as local jurisdictions take advantage of the opportunity to enact laws that require all trash to go to the designated facility and prohibit the export of trash to facilities in other localities and other states.

II. CLARKSTOWN'S FLOW CONTROL ORDINANCE IS PER SE INVALID AS A DIRECT RESTRICTION ON INTERSTATE COMMERCE

This Court has emphasized that the Constitution "was framed upon the theory that the people of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). The Framers of the Constitution were guided by "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979).

Flow control laws, in which states or localities seek to advance their own economic interests by erecting barriers to the free movement of trash, epitomize the kind of Balkanization that the Commerce Clause was intended to prevent. The localities that have adopted flow control laws rightly see trash as a resource that generates revenue, and the localities therefore seek to hoard it for their own benefit. This Court, however, has noted the potential consequences of such parochial legislation:

> We need only consider the consequences if each of the few states that produce copper, lead, high-grade

> iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun! . . . May Michigan provide that automobiles cannot be taken out of that State until local dealers' demands are fully met? . . . Could Ohio then pounce upon the rubber-tire industry, on which she has a substantial grip, to retaliate for Michigan's auto monopoly?

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 538-39 (1949).

This case thus represents the flip side of the issue addressed by this Court in *City of Philadelphia*, and again in *Fort Gratiot* and *Chemical Waste Management*. In those cases this Court, applying the now-established law that trash is a legitimate article of commerce entitled to the protection of the Commerce Clause, invalidated local efforts to ban or restrain the import of trash into a locality. While the local ordinance here under review seeks to restrict the *export* of trash *out* of a locality, it suffers from the same constitutional deficiencies identified by this Court in *City of Philadelphia*, *Fort Gratiot*, and *Chemical Waste Management*, and for the very same reasons must also be struck down.

A. Local Law 9's Restriction on the Export of Trash Is An Overt Discrimination Against Interstate Commerce

In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court emphasized that "a law that overtly blocks the flow of commerce at a State's borders" is "the clearest example" of "simple economic protectionism." *Id.* at 624. As to such laws, "a virtually *per se* rule of invalidity has been erected." *Id.* This virtual *per se* rule applies without regard to a local jurisdiction's motives in adopting such laws, since "the evil of protectionism can

reside in legislative means as well as legislative ends," and even a "presumably legitimate goal" cannot be accomplished "by the illegitimate means of isolating the State from the national economy." *Id.* at 626-27. *City of Philadelphia* thus struck down a New Jersey law prohibiting the import of waste without a permit, ruling that such a law "falls squarely within the area that the Commerce Clause puts off limits to state regulation." *Id.* at 628.

The Court used this same "virtual *per se*" rule of invalidity more recently when, relying squarely on *City of Philadelphia*, it struck down the waste import restrictions involved in *Fort Gratiot* and *Chemical Waste Management*. Because "[n]o State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade," those restrictions could not stand even though they otherwise represented attempts to "respond to legitimate local concerns" [9] and the solid waste itself had "no value." [10] The principles utilized by this Court to strike down these parochial efforts represent no more than an application of a fundamental and long-recognized tenet of the Commerce Clause—that "in matters of foreign and interstate commerce there are no state lines." *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911).

These same principles govern the disposition of this case. The local law here under review, which restricts the *export* of trash to points outside the town, raises the same fundamental issues as the local measures invalidated in *City of Philadelphia*, *Fort Gratiot*, and *Chemical Waste Management*. While it seeks to keep waste materials in, rather than out, the impact on interstate commerce is

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[9] *Chemical Waste Management*, 112 S. Ct. at 2015 n.6.

[10] *Fort Gratiot*, 112 S. Ct. at 2023; *see also City of Philadelphia*, 437 U.S. at 622-23.

the same—in both instances, the free movement of trash between the states is restrained.

The court below concluded that Local Law 9 "does not discriminate against interstate commerce" because it "applies evenhandedly to all solid waste processed within the Town, regardless of point of origin." Pet. App. 11a. But this rationale simply misses the point. The effect of Local Law 9 is to prohibit flatly the export of trash to points outside of Clarkstown unless the trash is first brought to the designated facility for processing. This type of restriction—"requiring business operations to be performed in the home [locality] that could more efficiently be performed elsewhere"—is "virtually *per se* illegal," even if the locality is "pursuing a clearly legitimate local interest." *Pike*, 397 U.S. at 145. Yet this export ban—which applies alike to trash generated in Clarkstown and trash originated out of state—was wholly ignored by the court below.

It is self-evident that Local Law 9, both on its face and as applied to petitioners, has a direct impact on interstate commerce. As noted earlier, the ordinance expressly provides that all non-recyclable trash finding its way into Clarkstown must be turned over to the designated facility operated by the town's contractor. Thus, on its face, the ordinance bans the export from the town of any trash that has not been first processed at the designated facility, and backs up this local monopoly with criminal sanctions. *See* Local Law 9 § 7, Pet. App. 54a.

As applied to petitioners, this ban has prohibited them from sending non-recyclable waste—which they separate from recyclable components of trash originating in other states and in other parts of New York—directly to power plants and landfills located in Ohio, Delaware, Pennsylvania, Kentucky, Indiana and Florida. Indeed, this litigation began when the town's law enforcement officials physically stopped the trucks that were hauling trash

from petitioners' facility to out-of-state destinations. Pet. App. 26a. Just as in *City of Philadelphia, Fort Gratiot,* and *Chemical Waste Management,* the interstate movement of waste materials unquestionably is directly impeded by the local law under attack.

Not only is the impact on interstate commerce of the Clarkstown ordinance no different in kind than that presented in this Court's prior cases dealing with restrictions on waste, it is equally pernicious—it is clearly motivated by the parochial "economic protectionism" that the Commerce Clause was designed to eliminate. In fact, the overtly protectionist nature of Local Law 9 presents an even more compelling case for its invalidity. In sharp contrast to the situation presented in *City of Philadelphia, Fort Gratiot,* and *Chemical Waste Management,* the waste materials here involved *do* have economic value. They are the raw material needed to supply and operate Clarkstown's designated waste facility in a cost-effective manner, and thereby eliminate the prospect of any payment by the town under its guarantee. And it is precisely for this economic reason that Clarkstown has attempted to restrict the departure of waste materials from the town. Thus, the ordinance's restriction on the export of waste materials represents no more than a naked attempt by Clarkstown to remove what has become a valuable resource from the flow of commerce in order to reserve it for the town's own economic benefit.

When the export restriction is properly viewed in this fashion, there is no question that it cannot pass muster under this Court's Commerce Clause jurisprudence. It is well established that the "virtually *per se* rule of invalidity," employed by the Court in striking down the import restrictions involved in *City of Philadelphia, Fort Gratiot,* and *Chemical Waste Management,* applies as well to export restraints. *See, e.g., South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82 (1984) (restriction on export of unprocessed logs); *Hughes v. Oklahoma,* 441 U.S. 322

(1979) (restriction on export of natural minnows); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949) (restriction on export of milk); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (restriction on export of raw and unshelled shrimp); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (restriction on export of natural gas). Indeed, this Court reiterated in *Fort Gratiot* that "the Commerce Clause prohibits states from 'advanc[ing] their own commercial interests by curtailing the movement of commerce, *either into or out of the state*.'" 112 S. Ct. at 2023 (emphasis added).

It is equally well-established that a state, consistently with the Commerce Clause, cannot give its own citizens "a preferred right of access . . . to natural resources located within its borders or to the products derived therefrom." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982); *see also Hughes v. Oklahoma, supra*. As this Court has often explained,

> These cases stand for the basic principle that a "State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State."

City of Philadelphia, 437 U.S. at 627 (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. at 10).

Thus, for example, in *Hughes*, this Court had little difficulty in striking down a state law which forbade the transportation out of state of natural minnows in commercially significant numbers for sale, where less discriminatory measures were available to meet the state's purported conservation concerns. In so holding, the Court emphasized that the measure in question "'overtly blocks the flow of interstate commerce at [the] State's borders,'" 441 U.S. at 337,[11] and that "[s]uch facial discrimination

[11] Quoting *City of Philadelphia*, 437 U.S. at 624.

by itself may be a fatal defect, regardless of the State's purpose . . . ." *Id.* So here, Local Law 9 "overtly blocks the flow of interstate commerce" in waste at the town border, preventing such trash from going to landfills or other users of waste in other states or other cities until it has first been processed by the designated facility. *See also Foster-Fountain Packing Co. v. Haydel, supra.*

More recently, in *New England Power Co. v. New Hampshire*, the Court made clear that an export restraint overtly designed to give a state's citizens an economic advantage over their neighbors was, without more, expressly forbidden by the Commerce Clause. That case involved an order of a state power commission forbidding the sale of locally-generated hydroelectric energy outside the state. Relying on its prior decisions holding that a state could not reserve natural resources for its own citizens, this Court struck down the ban, explaining:

> The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the States. The Commission has made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states. . . . Such state-imposed burdens cannot be squared with the Commerce Clause when they serve only to advance "simple economic protectionism."

455 U.S. at 339 (quoting *City of Philadelphia*, 437 U.S. at 624).

Nor is it constitutionally significant that the Clarkstown ordinance permits the trash to be exported by the designated facility after the trash has been processed there. On the contrary, this Court has repeatedly invalidated similar local processing requirements imposed on articles of interstate trade. For example, as early as 1928, this

Court held in *Foster-Fountain Packing Co.* that a state could not prevent the export of raw or unshelled shrimp in order to require that they be packed and canned locally. *Johnson v. Haydel*, 278 U.S. 16 (1928), reached the same conclusion with respect to a similar statute pertaining to oysters. Likewise, in *Toomer v. Whitsell*, 334 U.S. 385, *reh'g denied*, 335 U.S. 837 (1948), a state law expressly requiring shrimp caught within a state's territorial waters to be unloaded, packed and stamped at a local port "before 'shipping or transporting it to another state'" was held violative of the Commerce Clause. 334 U.S. at 403. In all of these cases, the statutory scheme permitted the goods involved *eventually* to enter interstate commerce, but the statute burdened interstate commerce by requiring that the goods first be processed locally. *See also Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (holding unconstitutional a state regulatory order prohibiting a grower from shipping Arizona-grown cantaloupes out-of-state until they were packed in approved containers where such order would have required packing in Arizona).

Not surprisingly, then, in a recent statement on the subject, a four-Justice plurality indicated that "there is little question that the [local] processing requirement cannot survive scrutiny under the precedents of the Court." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 99 (1984). *Wunnicke* involved an Alaska-imposed requirement that certain timber sold from state-owned lands be processed within Alaska before shipment out-of-state. Treating the requirement "as a naked restraint on export of unprocessed logs," the Justices easily disposed of any suggestion that the local processing requirement could be constitutionally imposed:

> Because of the protectionist nature of Alaska's local-processing requirement and the burden on commerce resulting therefrom, we conclude that it falls within the rule of virtual *per se* invalidity of laws that

> "bloc[k] the flow of interstate commerce at a State's borders."

Wunnicke, 467 U.S. at 100 (quoting *City of Philadelphia*, 437 U.S. at 624).[12] Given its clear "economic protectionist" intent and its "naked restraint on the export of unprocessed" trash, the Clarkstown ordinance likewise must fall.

Indeed, if anything, the in-state processing requirement imposed by Local 9 is an even greater restraint on interstate commerce than the laws struck down by this Court in *Foster-Fountain, Johnson, Toomer*, and *South-Central Timber Development*. In those cases the local laws were directed solely to the processing of goods that originated within the locality, prohibiting their removal until they had been locally processed. Here, Clarkstown's ordinance applies both to locally-generated trash and to trash originated in other states and other towns in New York. In fact, much of the trash handled in petitioners' recycling operation was brought into Clarkstown for the sole purpose of being separated into recyclable and non-recyclable components before going on to final destinations in other states. If a local processing requirement is invalid as to goods originating in the locality—as this Court has repeatedly held—then it is clearly invalid as applied to goods that originated in other towns and other states.

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[12] In the process, the plurality, quoting from the Court's prior decision in *Pike*, observed that the Court

> "has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal."

Wunnicke, 467 U.S. at 100 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. at 145).

The invalidity of Local Law 9's export restraint is particularly clear in light of *City of Philadelphia*, this Court's seminal Commerce Clause decision in the waste disposal area. In that decision, the Court struck down New Jersey's ban on the importation of out-of-state waste precisely because it was designed to preserve a valuable local resource for New Jersey's own citizens—the state's limited landfill space. The fact that waste materials, and *not* this local resource itself, constituted the articles of commerce burdened by the protectionist measure there involved was irrelevant to the Court's Commerce Clause analysis. Rather, just as in the export restriction cases, New Jersey's attempt to stop the free flow of commerce between the states in order to reserve for its own citizens a limited local resource was constitutionally impermissible.

As the Court explained:

> The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space. *It is true that in our previous cases the scarce natural resource was itself the article of commerce*, whereas here the scarce resource and the article of commerce are distinct. *But that difference is without consequence.* In both instances, the State has overtly moved to slow or freeze the flow of commerce for protectionist reasons. *It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.*

City of Philadelphia, 437 U.S. at 628 (emphasis added).

Thus, if anything, the case for invalidating the local ordinance here involved is even more compelling than that presented in *City of Philadelphia*. If a state cannot discriminate against a legitimate article of commerce to protect its economic interest in a separate and distinct local resource, *a fortiori*, it cannot do so where, as here, the burdened article of commerce and the local resource are one and the same. Thus, *City of Philadelphia* both foreshadowed and disposes of the issue presented by this case.

B. There Is No Factor Unrelated to Economic Protectionism That Could Justify Local Law 9

This Court emphasized in *City of Philadelphia*, with specific reference to waste, that the "evil of protectionism can reside in legislative means as well as legislative ends." 437 U.S. at 626. Thus, even if Local Law 9 had in fact been motivated by some factor other than economic protectionism, this could not save it from unconstitutionality, since even "a presumably legitimate goal" cannot be pursued by the "illegitimate means of isolating the State from the national economy." *Id.* at 627. This, of course, is precisely what Local Law 9 does, and this Court need not even reach the issue of the factors that motivated its enactment.

But even if such an inquiry were required, Local Law 9 could be upheld only if it were shown to be "demonstrably justified by a valid factor unrelated to economic protectionism." *Fort Gratiot*, 112 S. Ct. at 2024 (citation omitted). The burden of justifying the discrimination is on the state or locality defending the law. *See Wyoming v. Oklahoma*, 112 S. Ct. 789, 801 (1992). No such showing has been, or could be, made.

It is clear that the driving force behind Local Law 9, like that of other flow control laws, was economic. The injunction against petitioners' operations was not based on any health, safety, or aesthetic objections to petitioners' center—which indeed is licensed by the State. Pet. App. 3a. Nor does Local Law 9 purport to address any health or safety issues involved in the transportation of trash. In enacting the enabling legislation that authorized the town to adopt Local Law 9, the state legislature

stated that its purpose was "to make these facilities [with which the town contracted] technically and economically viable." R. 376.

The town's own evidence confirmed that Local Law 9 was enacted because the financial benefit conferred by it upon the operator of the designated trash disposal facility ultimately confers a financial benefit upon the town itself. As the town supervisor explained, a contractor constructed the designated facility for the town, which has the right to purchase the facility at the end of five years for $1. Pet. App. 35a. In return, the town guaranteed the operator of the designated facility at least 120,000 tons of trash per year, and must pay it a per-ton penalty if it fails to receive the guaranteed minimum.

Operations such as petitioners', which bypass the designated facility, increase the likelihood that the guarantee might not be met—unless those operations are halted by an export ban. The supervisor explained, "By unlawfully bypassing the TOWN's transfer station, the defendants are costing the TOWN and its residents thousands of dollars daily in uncollected revenues as well as increasing the likelihood of the TOWN's failure to meet its contractual obligation to the transfer station." Charles Holbrook Aff., J.A. 11, R. 60.

Thus, despite the reference of the Appellate Division to the safety and health aspects of solid waste disposal, Pet. App. 9a, it is clear that the purported safety and health benefits of Local Law 9 derive simply from "the continued economic viability" of the town's waste facility—that is, from the town's desire not to pay under its guarantee to its contractor. Pet. App. 10a. In this respect, the situation here is essentially the same as that before the Eighth Circuit in *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381, 1389 (8th Cir. 1993), where the court observed that although the construction of the disposal facility may have been prompted by "legitimate environmental concerns, the purpose behind the Ordinances

is solely economic." *See also Sporhase v. Nebraska*, 458 U.S. 941, 957-58 (1982) (where measure discriminates against interstate commerce, state must demonstrate a "close fit" between measure and asserted local purpose).

Given that Local Law 9 constitutes economic protectionism, the inquiry ends there. This Court's cases have never permitted any further inquiry as to whether a protectionist law is "good" protectionism on account of its locally beneficial effects, and therefore beyond the reach of the Commerce Clause. On the contrary, the Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) made clear that protectionism for a salutary purpose, such as "to promote a local industry," is still invalid protectionism. "If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory." *Id.*

C. Any Legitimate Local Concern Here Can Be Met Through Non-Discriminatory Alternatives

Even if Local Law 9 could somehow be justified by a "valid factor unrelated to economic protectionism"—which it cannot—it would still be unconstitutional absent a demonstration by the town that a legitimate, non-protectionist goal "cannot be adequately served by non-discriminatory alternatives." *Fort Gratiot*, 112 S. Ct. at 2027. No such showing has been, or could be, made. To the contrary, there are a number of alternatives by which the goal of acquiring adequate trash for the designated facility could be pursued.[13]

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[13] For purposes of this discussion, petitioners assume—contrary to fact—that there is some need for a municipal government to be involved in the construction and operation of a waste disposal facility in the first place. In reality, household and industrial waste disposal is a highly competitive, nationwide market that will be served with or without the intervention of a municipal government. *See, e.g., Solid Waste Price Index*, Solid Waste Digest, June 1993, at i-vi (national summary of current tip fees at hundreds of landfills, transfer stations, and incinerators).

The most obvious is simply for the facility to compete for trash in the marketplace. Unless there is literally no trash available—an unlikely prospect in today's throw-away society—there is no reason that the facility cannot compete for trash, on the basis of price and service, with its competitors in other localities. And if some assurance of a steady supply of trash is needed, it can be obtained through the same process as any other business—by entering into long-term contracts with either the generators of large quantities of waste or the companies that collect the waste. This is, quite simply, the way the American economy functions.

Nor is it true that a waste disposal project is impossible to finance without a flow control law. The existence of a government-guaranteed monopoly will obviously make any enterprise more attractive to investors, but that does not make flow control *necessary* to the financing of waste disposal projects. As an industry analyst has explained,

> While important, legal waste flow control is not a requirement for receiving a [Standard & Poor's bond] rating. It is not necessarily even a requirement for receiving a high rating. If a system can provide solid waste disposal at a cost level below the surrounding market, the incentive for a hauler to avoid the system is eliminated. The more competitive the rate, the higher the rating the system's debt is likely to enjoy.

Mark Ryan, *Courts Complicate Solid Waste Financings*, Standard & Poor's Creditweek Municipal, Nov. 9, 1992, at 69, 70 [hereinafter *Standard & Poor's*].

To be sure, if a facility proves unable to sustain itself by competing for customers and charging market rates for its services, the town may well find it necessary to shore up the facility's finances. But a flow control law prohibiting the export of trash except through the facility is far from the only reasonable means of doing so. This Court observed in *Chemical Waste Management* that con-

cerns about *excessive* waste entering a local facility can be addressed through nondiscriminatory means such as a per-ton fee on all waste disposed of within the state (whether from in state or out of state), a permit tax on all vehicles transporting waste, or "an evenhanded cap on the total tonnage landfilled." 112 S. Ct. at 2015. The same is true where the concern is about *insufficient* waste entering the facility. If the facility incurs a deficit in a competitive interstate market, the town can offset the deficit by, for example, increasing local taxes or imposing utility surcharges. *See Waste Recycling Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566, 1581 (M.D. Ala. 1993).

The feasibility of such an approach is confirmed by the actual experience of other local jurisdictions. For example, in Montgomery County, Maryland, the construction and operation of a new waste-to-energy plant is being financed in part by local tax assessments.[14] The plant will not need or use a flow control law prohibiting the use of facilities located elsewhere. Similarly, Palm Beach County, Florida avoids flow control with "a special assessment and a tipping fee, which allows matching of fixed costs with the assessments and results in competitive tipping fees." [15]

Given the ready availability of these non-discriminatory alternatives, which have been used successfully by other local jurisdictions, Local Law 9 plainly cannot survive scrutiny under the Commerce Clause.

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[14] *See* Leila Fiester, *Foes Push for '94 Referendum on Waste Disposal Fees*, Washington Post, March 25, 1993, at M1.

[15] *Standard & Poor's, supra*, at 70.

III. CLARKSTOWN'S FLOW CONTROL ORDINANCE VIOLATES THE COMMERCE CLAUSE EVEN IF ITS EFFECT ON INTERSTATE COMMERCE IS REGARDED AS INCIDENTAL

Because Local Law 9 is clearly a protectionist statute that directly burdens interstate commerce, it is unnecessary to engage in the balancing that is appropriate for laws whose effect on interstate commerce is only incidental. Nevertheless, even if Local Law 9 were considered under that more lenient standard, it still could not pass muster.

The standard to be applied in balancing cases was summarized by the Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[16]

Even if Local Law 9 could somehow be regarded as an even-handed, non-protectionist effort to advance a legitimate local public interest—which it cannot—the burden on interstate commerce is clearly "excessive in relation to the putative local benefits" and "could be promoted as well with a lesser impact on interstate activities." Thus

[16] The statute before the Court in *Pike* was a discriminatory measure requiring that Arizona-grown cantaloupe be packed in the state. Although *Pike* is commonly cited for its expression of the balancing standard, quoted above, the Court actually employed the *per se* standard in striking down the statute. *See* 397 U.S. at 145.

it runs afoul of the Commerce Clause even under the more liberal balancing test applicable to laws whose burdens on interstate commerce are only incidental.

A. The Local Benefits of the Clarkstown Ordinance Are Limited

The state trial court concluded that the "legitimate local purpose of Local Law No. 9 is the regulation and control of solid waste disposal within the town of Clarkstown." Pet. App. 19a. But this confuses the purpose of constructing the new waste facility with the purpose of the export ban. As the Eighth Circuit cogently observed in response to a similar contention, "[e]ven if the [local jurisdiction] acted out of legitimate environmental concern when constructing the Plant, the purpose of the Plant is not the same as the purpose of the [flow control] Ordinances." *Waste Systems*, 985 F.2d at 1388. As discussed *supra* at pp. 25-26, the stated purpose of the enabling legislation and the testimony of the town supervisor confirm that the purpose of the export ban (as distinguished from the construction of the waste facility) was to insure the financial viability of the facility and make certain that the town would not have to pay under its guarantee.

It is that limited local interest—in avoiding a payment under the guarantee that it voluntarily provided the waste facility—against which the burden on interstate commerce would have to be weighed.

B. The Burden Imposed By Local Law 9 on Interstate Commerce Is A Heavy One

As discussed in part II-A, *supra*, Local Law 9 does not merely burden commerce, but bans certain commerce out of Clarkstown entirely. In addition to this flat prohibition, however, Local Law 9 also places various other burdens on interstate commerce. In considering these burdens, "[t]he practical effect of [Clarkstown's] statute must be evaluated not only by considering the consequences of the statute itself, but also by considering . . .

what effect would arise if not one, but many or every, [local jurisdiction] adopted similar legislation." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992) (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)). This is particularly necessary with respect to flow control laws, which have already been authorized by over half the states in the nation.[17]

Viewed in this broader context, the burden imposed on interstate commerce by flow control laws such as Local Law 9 is apparent. First, and most obvious, they prevent trash from being sent to the most cost-effective disposal facilities, and insulate the designated facility from all price competition. Here, as noted, the fee of $81 per ton is significantly more than the $70 tipping fee previously charged by petitioners. The $11 per ton difference, which constitutes a 15% increase over the tipping fee that Carbone charged its customers, cannot be dismissed as inconsequential, as the Appellate Division sought to do. *See* Pet. App. 12a.

The price differentials resulting from flow control have also been significant elsewhere, as indicated by the following examples:

—$72 per ton at the designated facility v. $30 per ton at competitive facility. *Waste Systems*, 985 F.2d at 1387;

—$100 per ton at designated facility v. "approximately half" that at competitive facility. *J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection*, 857 F.2d 913, 916 (3d Cir. 1988);

—$37.50 per ton at designated facility v. $29.50 per ton at competitive facility. *Container Corp. of Carolina v. Mecklenburg County*, No. 92 cv-154-MU, slip op. at 4 (W.D.N.C. June 14, 1992).

[17] *See* fn. 8, *supra*.

These inflated tipping fees not only result in increased disposal costs for households and businesses, but also create an unintended incentive to engage in illegal (and environmentally hazardous) dumping. Flow control "increases the risk that waste will be disposed of improperly within the state by preventing any waste from being exported." *DeVito v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775, 784 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991). Given the choice between disposing of trash legally at a highly inflated price or dumping illegally, some irresponsible persons will choose the latter.

In addition to eliminating price competition, flow control eliminates competition on the basis of technological improvements. In Loudon County, Virginia, for example, an entrepreneurial farmer developed an inexpensive method for composting yard wastes. His tipping fee was $10 per ton, compared to $43 to $55 per ton for government-owned facilities in the area. Rather than welcoming his enterprise, however, the local government engaged him in a protracted legal contest, apparently to protect the revenues of government-owned landfills. *See* Logomasini, *supra*, at 65-67.

The possibility of flow control in an area will discourage new entry into the waste disposal business even in areas currently without flow control. Entrants can only be deterred by the knowledge that town officials can make a deal with one of their competitors at any time and shut them out of the market. Similarly, waste disposal companies may be reluctant to locate in smaller towns—which often have suitable sites available at lower costs—for fear that their access to the volume of trash needed to make the facility viable will be obstructed by the flow control laws of larger cities in which such trash is generated.

The effects of flow control laws are particularly pernicious where, as here, they apply to waste that originates

outside the locality, as well as to locally-generated waste. By forcing the out-of-state (or out-of-county) waste to go to the designated local facility for processing before it is permitted to exit the state, the locality can shift some of the cost of operating the facility away from its own citizens.[18] These costs have increased significantly, and will continue to increase, as a result of stricter environmental safeguards imposed on the construction and operation of the facilities, as well as other cost trends. *See* Kelly Outten, *Waste To Energy: Environmental and Local Government Concerns,* 19 U. Rich. L. Rev. 373, 375 (1985); *Interstate Transportation of Solid Waste: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce,* 102d Cong., 1st Sess. 317-19 (1991) (statement of Richard F. Goodstein, Divisional Vice President, National Government Affairs, Browning-Ferris Industries) [hereinafter *1991 House Hearings*]. In shifting these costs, however, flow control laws impose a burden on the citizens of other areas, who also have to deal with waste disposal problems—and who will inevitably be tempted to enact a similar law for their own benefit.

Moreover, the effects of a state or local ban on the export of trash extend beyond the solid waste industry. For example, by limiting the source availability of trash or artificially raising its price, such laws obstruct the use of solid waste as a source of energy. In this case, petitioner sent substantial volumes of its nonrecyclable waste to "resource recovery centers" in other states, which burn

[18] Judge Brieant, in the federal court decision granting petitioners a preliminary injunction against enforcement of Local Law 9, focused on the effect of the ordinance upon waste originating out of town. He held that the town could not "shift or defray the cost of disposing of local solid waste for the benefit of local residents to out-of-state persons or interests by improperly restricting competition and overtly blocking the interstate transportation of solid waste generated out of Town." Pet. App. 43a.

trash to generate electricity. R. 332. And the U.S. Environmental Protection Agency has found that flow control laws have restricted the recovery of paper for recycling. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action* 3.D-6 (1988).

When these heavy burdens on interstate commerce are balanced against the local interest in avoiding payments under its guarantee to the designated facility, it is plain that the burden on interstate commerce is "excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142.[19] At present, some 15 million tons of municipal waste move in interstate commerce each year.[20] If flow control laws are allowed to stand, the result will be the imposition of substantial burdens on interstate movements of waste throughout the country. Local Law 9 must therefore be invalidated even if the balancing test applicable to laws having only an incidental effect on interstate commerce is applied.

[19] Even if Local Law 9 could be regarded, contrary to fact, as having some relation to health and safety, as the Appellate Division suggested (Pet. App. 9a), this would not lead to a different result. As this Court has observed, "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662, 670 (1981) (plurality opinion) (*citing Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429 (1978)).

[20] *1991 House Hearings* at 81 (statement of Don R. Clay, Asst. Administrator for Solid Waste and Emergency Response, Environmental Protection Agency). At the time of these hearings, only one state in the union, Montana, had no known interstate movements of municipal waste. *Id.* at 263, 283-91 (statement of Allen Moore, President, National Solid Wastes Management Association).

C. The Putative Local Benefits Could Be Obtained By Non-Discriminatory Means

Any legitimate local interest in the financial well-being of a waste disposal facility can readily be advanced with a lesser impact on interstate commerce. Various alternatives by which a local jurisdiction can assure the financial viability of a waste facility are discussed in detail in Part II-C, *supra* at pp. 27-29. Beyond the obvious solution of competing in the marketplace and entering into long-term contracts with suppliers of waste, a locality can readily make up any deficit through increased local taxes or utility fees. The fact that such means may not be politically popular does not detract from their feasibility for purposes of Commerce Clause analysis. When the extremely heavy burden imposed on interstate commerce by flow control laws such as Local Law 9 is weighed against the reasonable and non-discriminatory alternatives available to the town, Local Law 9 plainly violates the Commerce Clause even if analyzed under the balancing test applicable to laws having only an incidental effect on interstate commerce.

When applying the balancing test, this Court has not hesitated to strike down facially neutral state and local laws that placed an excessive burden on interstate commerce. In the leading case of *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945), the Court struck down a state law forbidding passenger trains of more than fourteen cars and freight trains of more than seventy cars; although the law was not found to have a protectionist purpose, the Court found the burden it imposed on interstate train traffic violated the principle that "a state may not regulate interstate commerce so as *substantially to affect its flow* or deprive it of needed uniformity in its regulation. . . ." *Id.* at 779-80 (emphasis added). "Here examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation

service, which must prevail." *Id.* at 783-84. *See also Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

In this case, it is "plain that the [local] interest"—avoiding the need to pay under the guarantee to which it consented—"is outweighed by the interest of the nation in an adequate, economical and efficient" waste disposal service. The contrary conclusion of the Appellate Division, Pet. App. 12a, was error.

These consequences confirm that Local Law 9 falls squarely within the prohibitions of the Commerce Clause. Although flow control laws were unknown to the generation that framed and ratified the Constitution, the supporters of the Constitution well understood the incentives for political subdivisions to impose such burdens on commerce and the ingenuity with which they would attempt to do so:

> A very material object of this [Commerce Clause] was the relief of the States which import and export through other States from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience that such a practice would be introduced by future contrivances. . . .

The Federalist No. 42 (Madison).

Local Law 9 is just such a "contrivance," and should be struck down.

CONCLUSION

For these reasons, the Court should reverse the decision and order of the Supreme Court, Appellate Division, Second Department of the State of New York.

Respectfully submitted,

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